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No. 88-451

In the Supreme Court of the United States

OCTOBER TERM, 1988

PETER E. HORRIGAN,
PETITIONER,

v.

GENERAL DYNAMICS CORPORATION,
RESPONDENT.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether an Administrative Law Judge, in a case arising under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§901 *et seq.* (the "Act"), is compelled by 33 U.S.C. §928(a) to award attorney's fees and expenses to a claimant's attorney for the unsuccessful prosecution of a discriminatory discharge claim filed under Section 49 of the Act (33 U.S.C. §948a) where a claimant has achieved partial success in a separate claim for disability benefits under the Act?

II

RULE 28.1 LISTING

Respondent General Dynamics Corporation's corporate affiliations, including all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates is as follows:

Etudes Techniques et Constructions Aerospatiales, Societe Anonyme (ETCA)
General Dynamics (C.I.) Limited
Mansour-General Dynamics Ltd.
Tusas Aerospace Industries, Inc.
Ankara Hilton
Mansour-General Dynamics GD (C.I.)
Perdata Corporation

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The respondent General Dynamics Corporation respectfully requests that this Court deny the petition for writ of certiorari to the United States Court of Appeals for the First Circuit. The decision of the Court of Appeals is reported at 848 F.2d 321 (1988).

Statement of the Case

Peter Horrigan ("Petitioner"), who was formerly employed as a crane operator at respondent General Dynamics Corporation's Quincy Shipbuilding Division ("General Dynamics"), filed two separate and distinct claims under the Longshore and Harbor Workers' Compensation Act (33 U.S.C. §§901 *et seq.*) (the "Act") in 1983. One claim sought disability benefits due to injuries to his knee and ankle. The other claim alleged discriminatory discharge in violation of Section 49 of the Act (33 U.S.C. §948a). (Petition, Appendix C, p. 20a)

As a matter of convenience, the Administrative Law Judge ("ALJ") of the U.S. Department of Labor consolidated the two claims for hearing. In December, 1983, after a full hearing on the merits of both claims, the ALJ awarded Petitioner some, but not all, of the disability benefits he had sought under the Act. The ALJ denied the Section 49 claim, finding that the Petitioner "was discharged for violating company rules and for falsifying his reason for absence from work during the period between December 14, 1981 and January 11, 1982." (Petition, Appendix C, p. 33a) Petitioner subsequently appealed the ALJ's ruling on his claim for disability benefits to the Benefits Review Board ("Board") of the U.S. Department of Labor. Petitioner did not appeal the ALJ's denial of his Section 49 claim.

Petitioner's counsel submitted to the ALJ an application for attorney's fees and expenses for his work on both the disability claim and the Section 49 claim. Prior to ruling on this application, the ALJ requested that Petitioner's counsel submit supplemental information about his fee application and invited the parties to file "written arguments concerning whether or not the fee requested by [Petitioner's] counsel is affected by my denial of the Section 49 claim." (Petition, Appendix C, p. 34a)

Thereafter the ALJ issued a "Supplemental Decision and Order Granting Attorney Fee" in which he disallowed attorney's fees ($4,000) for counsel's excessive estimates of the hours he worked, awarded attorney's fees ($7,031.25) and expenses ($1,602.76) to Petitioner's counsel for the partial success in the prosecution of the claim for disability benefits, and denied attorney's fees ($4,750.00) and expenses ($507.39) for work associated with the unsuccessful prosecution of the Section 49 claim, finding that it was "a separate and distinct claim from the one for compensation" and was "completely devoid of merit." (Petition, Appendix D, p. 40a and p. 38a)

Petitioner's counsel petitioned the Board for review of the denial of attorney's fees and expenses for his work on the unsuccessful Section 49 claim. The Board modified the ALJ's

order to award Petitioner attorney's fees for his counsel's work on the unsuccessful Section 49 claim, effectively ruling that the ALJ did not have discretion to deny attorney's fees under the circumstances of this case. (Petition, Appendix B, p. 16a)

General Dynamics petitioned the Court of Appeals to review the Board's modification of the ALJ's order with respect to attorney's fees. The First Circuit denied enforcement of the Board's decision and remanded the case with instructions to accept the findings of the ALJ. 848 F.2d at 323.

Reasons Why the Petition Should Be Denied

I. There Is No Conflict Among the Circuits on the Question Presented.

The First Circuit's decision is not in conflict with the decision of any other federal court of appeals on the same matter. As Petitioner concedes, the First Circuit is the first appellate court to reach the question presented. Petitioner's argument that the petition should be granted due to "the lack of case law at the appellate level" (Petition, p. 5) ignores the rationale underlying Supreme Court Rule 17.1(a), which invokes this Court's supervisory powers to resolve *conflicts* among the courts of appeals. Petitioner's suggestion that the First Circuit's decision represents a departure from prior decisions of the Benefits Review Board is incorrect; but even if it had merit, such a conflict would not warrant the exercise of this Court's discretion to grant certiorari.

II. This Case Does Not Involve a Novel Question of Law and Turns on Its Own Facts.

The legal standard applied by the First Circuit is consistent with this court's decisions and the applicable legislation. The standards for awarding attorney's fees to "prevailing parties" under federal statutes were fully elaborated in *Hensley* v. *Eckerhart*, 461 U.S. 424 (1983). The First Circuit's application of those standards to the statute involved in this case, which

requires "the successful prosecution of [a] claim" before attorney's fees and expenses can be awarded, is wholly consistent with the teaching in *Hensley*.

In *Hensley*, this Court addressed the appropriate result in cases—like this case—where a plaintiff presents distinctly different claims for relief that are based on different facts and legal theories. In that circumstance, the Court pointed out, "work on an unsuccessful claim cannot be deemed to have been 'expended in pursuit of the ultimate result achieved.' " *Id.* at 435. It was this principle that led the ALJ to deny attorney's fees for work expended on the Section 49 retaliatory discharge claim, and it was this principle that the First Circuit applied in reviewing the Board's decision.

Contrary to Petitioner's argument, the First Circuit did not rule that jointly filed claims of disability and retaliatory discharge under the Act can never be treated as related. The Court expressly rejected "any hard and fast rule," and noted that in some cases where the claims are adjudicated in a single hearing, fees "might be awarded without regard to the differential success of the claims." 848 F.2d at 326. The Court further observed, however, that where the ALJ can differentiate work performed on separate claims, "partial success should mean partial fees." *Id.* at 326.

In the end, the application of these principles must be left to the factfinder, a principle which the Board overlooked. *See* 33 U.S.C. §921(b)(3) ("The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole.") As this Court emphasized in *Hensley*, the factfinder's discretion should be broad in view of his "superior understanding of the litigation and the desirability of avoiding frequent appellate review of what are essentially factual matters." 461 U.S. at 437.

In the instant case, the First Circuit properly sustained the ALJ's factual finding that the claims were separate and dis-

tinct, noting that the "record manifests the separateness of the events and evidence at issue in the two claims." 848 F.2d at 326. Court noted that the ALJ had "methodically scrutinized" the total hours expended by petitioner's counsel, considered his estimate of what percentage of his time had been spent on the Section 49 claim, and identified and deducted particular expenses relating to that claim. In short, this case turns on its own facts and on the narrow scope of review of the ALJ's findings.

Petitioner incorrectly asserts that the First Circuit's decision conflicts with principles of statutory interpretation and fails to apply the plain and unambiguous language of the statute. Section 28(a) of the Act (33 U.S.C. §928(a)) provides that reasonable attorney's fees shall be paid by an employer only when "the person seeking benefits shall...have utilized the services of an attorney at law in *the successful prosecution of this claim*...." (Emphasis supplied.)

The legislative history of the Act confirms the requirement of a "successful prosecution" of a claim before attorney's fees can be awarded:

> H.R. 12006 amends section 28 of the Act to authorize assessment of legal fees against employers in cases where the existence or extent of liability is controverted and the claimant succeeds in establishing liability or obtaining increased compensation in formal proceedings or appeals. Attorney's fees may only be awarded against the employer where the claimant succeeds, and *the fees awarded are to be based on the amount by which the compensation payable is increased as a result of litigation*. Attorney's fees may not be assessed against employers (or carriers) in other cases.

1972 U.S. Code Cong. & Admin. News 4698, 4706. (Emphasis supplied.)

In this case, the First Circuit correctly ruled:

> The ALJ honored Congress' intention that fees should be awarded "based on the amount by which the compensation payable is increased as a result of litigation." The Section 49 claim did not increase respondent's compensation at all.

Other courts of appeals have affirmed the requirement of a "successful prosecution" of a claim before an attorney's fee can be awarded. *American Stevedores, Inc.* v. *Salzano*, 538 F.2d 933 (2nd Cir. 1976); *Atlantic and Gulf Stevedores* v. *Director, Office of Workers' Compensation Programs et al.*, 542 F.2d 602, 609-610 (3d Cir. 1976); *Presley* v. *Tinsley Maintenance Service*, 529 F.2d 433, 437 (5th Cir. 1976); and *Portland Stevedoring Company* v. *Director, OWCP*, 552 F.2d 293, 294 (9th Cir. 1977).

Finally, contrary to Petitioner's argument, the question presented in this case is not fundamental to "the constitutional protection against the deprivation of life, liberty, or property without due process of law." (Petition, p. 6) There is no constitutional guarantee of attorney's fees for a claimant alleging retaliatory discharge under Section 49, particularly when, after a full and fair hearing, that claimant's allegations have been found to be "completely devoid of merit."

Conclusion

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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